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No. 82-39

In the Supreme Court of the United States

October Term, 1982

HISPANIC COALITION ON REAPPORTIONMENT et al.,

Appellants

v.

LEGISLATIVE REAPPORTIONMENT COMMISSION et al.,

Appellees

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

APPELLEE DAVIS' MOTION TO AFFIRM

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RULE:

Rule 52, Federal Rules of Civil Procedure 5

STATE CONSTITUTION:

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MOTION TO AFFIRM

Appellee William R. Davis, Secretary of the Commonwealth of Pennsylvania, by his attorneys, hereby asks this Court to affirm the decision of the United States District Court for the Eastern District of Pennsylvania dated April 6, 1982, on the grounds that the questions upon which the decision of this case depends are so insubstantial as not to require further argument.

OPINIONS AND RULINGS BELOW

The decision of the three-judge court below is reported at 536 F. Supp. 578.

ARGUMENT

I. The Findings of the District Court Are Not Clearly Erroneous or Contrary to Law

The three-judge court found that the plaintiffs had "utterly failed to provide the barest trace of evidence to support their claim that defendant [Legislative Reapportionment] Commission designed the legislative districts in Pennsylvania with the *intent* to discriminate against Hispanic voters". 536 F. Supp. at 586, emphasis in original. The appellants claim that this finding is contrary to the law and the evidence, but they have failed to present any new or substantial question for this Court's consideration. To the contrary, the legal standard in cases of this kind is well-settled and was correctly applied below, and the lower court's findings are amply supported in the record.

It is clear that, to successfully attack a state redistricting plan on a claim of racial gerrymandering, the plaintiff must, in the District Court's words, "demonstrate that the . . . plan was designed purposefully to minimize or cancel out the voting potential of racial or ethnic minorities." 536 F. Supp. at 585. *Rogers v. Lodge,* U.S. , No. 80-2100 (July 1, 1982); *Mobile v. Bolden,* 446 U.S. 55 (1980); *Whitcomb v. Chavis,* 403 U.S. 124 (1971); *Wright v. Rockfeller,* 376 U.S. 52 (1964). The appellants, however, have obliquely attacked this line of cases. They suggest that "a court examining a claim under Section 2 of the Voting Rights Act has a duty similar to that of the United States Department of Justice under Section 5" of the same Act. Juris. Statement at 15.

Section 5 of the Voting Rights Act, 42 U.S.C. §1973c, has to do with the "preclearance" by the Justice Department of any changes in electoral practices in the states and municipalities subject to Section 5's provisions. Such areas, by definition, have histories of pervasive racial discrimination in voting matters. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).[1] Accordingly, in a Section 5 "preclearance" proceeding, the burden is upon the state or municipality to prove that its proposed change has neither a discriminatory purpose nor a discriminatory effect. *Rome v. United States*, 446 U.S. 156 (1980).

The appellants' suggestion, then, would not only shift the burden of proof in Section 2 cases from the plaintiff to the defendant, it would significantly augment that burden. Heretofore, such a defendant had only to refute any evidence of discriminatory intent; now, under the appellants' theory, such a defendant would have to affirmatively prove the lack of any such intent, and the lack of any discriminatory effect as well. The appellants' argument thus eliminates any distinction between Sections 2 and 5 of the Voting Rights Act and effectively extends the "preclearance" provisions of Section 5 to every jurisdiction in the country. This is manifestly at odds with the congressional intent, and with this Court's decisions cited above. The appellants have offered no authority to support this position,[2] and Secretary Davis submits that it is so devoid of substance as to require no further argument.

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[1] Pennsylvania is not subject to Section 5, and the appellants have not argued that it is.

[2] Section 2 of the Voting Rights Act, 42 U.S.C. §1973, was recently amended, Stat. (1982), Pub. L. 97-209, June 29, 1982. *See* Juris. Statement at 4, n. 3. The appellants have not suggested that this amendment supports their position or that it requires this Court to reconsider its earlier decisions.

The appellants next argue that the lower courts have been provided with insufficient guidance on exactly what it is that plaintiffs such as themselves must prove in order to establish that there has been intentional discrimination. Juris. Statement at 14-17. This Court, however, has explicitly declined to adopt such a checklist approach to proof of intentional discrimination. *Mobile v. Bolden, supra.* Rather, it has said:

> "Necessarily, an invidious discriminatory purpose may often be inferred from the *totality of the relevant facts. . .*" Thus determining the existence of a discriminatory purpose "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."

Rogers v. Lodge, supra, slip op. at 5, citations omitted, emphasis added. *See also,* Section 2(b) of the Voting Rights Act, Stat. (1982), Pub. L. 97-209, June 29, 1982 (violation of Section 2(a) to be established based on "totality of circumstances").

The distinguishing feature of this case is not the absence of a standard of proof but the failure of the appellants, plaintiffs below, to prove anything at all. Appellants made no attempt to establish that voting in Philadelphia is along racial bloc lines; that elected officials are unresponsive to the needs of the Hispanic community; that Hispanic citizens are hampered in obtaining access to the polls; or that Hispanic citizens are denied effective participation in the political or economic life of the city. *Cf. Rogers v. Lodge, supra,* slip op. at 10-14. This comparison with *Rogers* indicates the wide areas of proof that were open to the appellants, and of which they failed to take advantage. Under such circumstances, there is no occasion for this Court to re-examine its decisions in *Rogers* and *Mobile.*

The appellants argue strenuously, however, that the three-judge court failed to draw the appropriate inferences from such evidence as they did present. Juris. Statement at 10-14. Of course, in an appeal from a three-judge court, as in any appellate matter, Fed. Rule Civ. Proc. 52 requires that the trial court's findings of fact not be set aside unless they are "clearly erroneous." *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974). Findings of intentional discrimination (or the lack thereof) are factual in nature and are governed by the "clearly erroneous" standard. *Rogers v. Lodge, supra,* slip op. at 10. There is no clear error here.

The appellants rely on the following allegations: that one David Glancey,[8] acting on behalf of the Democratic Party in Philadelphia, made certain suggestions to the Legislative Reapportionment Commission regarding redistricting in the city; that Glancey's suggestions intentionally fragmented the Hispanic community; that the Commission then published a preliminary redistricting plan which adopted Glancey's suggestions in all material respects; and that the Commission thereafter, in adopting its final plan, failed to create a Hispanic majority district, although it had been told that it was possible to do so. This, according to the appellants, *required* the District Court to find an intent to discriminate on the part of the Commission. The District Court declined to do so, however, and its findings are well supported by the record.

First, the District Court found, based on evidence in the record, that Glancey's purpose in proposing a fragmentation of the Hispanic community was not to discrimi-

[8] Mr. Glancey was a defendant below and is an appellee in this Court, and is separately represented.

nate against Hispanic persons. Rather, he saw his proposals as being in the nature of a bargaining position: they were the first step in a lengthy process, in the course of which Glancey fully intended the Hispanic fragmentation to be remedied, and the end result of which was to be a competitive advantage for Glancey in his partisan battles with the Republicans. 536 F. Supp., at 580; App. to Juris. Statement at A-99 to A-101, A-156 to A-157. Second, the District Court found that, whatever may have been Mr. Glancey's intentions, there was no evidence that the Commission knew of or shared them.[4] 536 F. Supp. at 585. Third, the District Court pointed out that the Commission's preliminary plan was submitted to public scrutiny, and that the Commission received written and oral comments on this very point from Hispanic citizens. 536 F. Supp., at 581.

Finally, and most importantly, there remained what the District Court called,

> the unalterable truth that the Commission revised that [preliminary] plan to provide for a district with a significantly greater proportion of Hispanic voters equal to 40% of the district's population. It is more reasonable to infer from such a marked upward adjustment that the Commission . . . did what it could to accommodate [the views of Hispanics], than it is to infer that the Commission embraced the views of defendant Glancey. 536 F. Supp., at 585-586.

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[4] By constitutional mandate, the Legislative Reapportionment Commission is a bipartisan body, consisting of two legislators from each party, plus a chairman chosen by them. Pa. Const. Ann. (Purdon), Art. 2, §17. This tends to refute any suggestion that the Commission was the captive of the Democratic Party.

The appellants argue, however, that this "marked upward adjustment"—from 15% to 40%—was not enough, and that the District Court should have inferred a discriminatory intent because the Commission did not create a district with the maximum possible concentration of Hispanic persons. No such inference was justified. Redistricting bodies may properly take racial factors into account, *United Jewish Organizations v. Carey*, 430 U.S. 144, 165-168 (1977), but they are not obliged to maximize the concentration of any racial group. If every such group were entitled to a majority district whenever one could theoretically be created, we would be well on the way to a theory of proportional representation which has been repeatedly rejected by this Court. *Mobile v. Bolden, supra; Whitcomb v. Chavis, supra.*

Appellants have therefore provided this Court with no grounds on which to reverse the District Court's findings, and those findings should be affirmed.

II. The District Court Properly Sustained the Invocation of Legislative Privilege by Some of the Defendants

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The appellants attempted below to take the deposition of James O. Freedman, the Chairman of the Commission, and took the deposition of defendant Robert O'Donnell, a state legislator who also served as a staff assistant to one of the Commission members. App. to Juris. Statement at A-19 to A-48. The appellants also examined Mr. O'Donnell at trial. *Id.* at A-107 to A-111, A-117 to A-121. Both Mr. Freedman and Mr. O'Donnell invoked the legislative privilege. The District Court sustained the invocation of the privilege as to Mr. Freedman, and sustained it in part as to Mr. O'Donnell. *Id.* at A-44, A-107.

The Legislative Reapportionment Commission and Mr. O'Donnell, separately represented, are appellees in this matter. It is Secretary Davis' understanding that each of these parties intends to file a motion to affirm in which the legislative privilege issue will be addressed, and he believes that this issue will be most effectively addressed by those parties who are most directly involved. Rather than repeat their arguments here, Secretary Davis simply notes his position that the District Court's rulings on this issue were correct.

CONCLUSION

For the foregoing reasons, Appellee William R. Davis asks this Court to affirm the order of the court below.

Respectfully submitted,

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